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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ROBERT P. HAGEN,

Petitioner,

v.

STATE OF UTAH,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Utah

BRIEF FOR THE STATES OF CALIFORNIA, NORTH DAKOTA, SOUTH DAKOTA, AND WASHINGTON, AS AMICI CURIAE IN SUPPORT OF RESPONDENT STATE OF UTAH

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BRIEF FOR THE STATES OF CALIFORNIA, NORTH DAKOTA, SOUTH DAKOTA, AND WASHINGTON, AS AMICI CURIAE IN SUPPORT OF RESPONDENT STATE OF UTAH

INTEREST OF AMICI CURIAE

This case presents an issue of substantial importance to *Amici* and other States with present and former Indian reservations. In 1985, the United States Court of Appeals for the Tenth Circuit concluded that Acts of Congress with operative language restoring Indian reservations to the public domain were not intended to disestablish those reservations. *Ute Indian Tribe v. State of Utah*, 773 F.2d 1087 (10th Cir. 1985), *cert. denied*, 479 U.S. 994 (1986). The Court of Appeals premised its decision on a misreading of *Solem v. Bartlett*, 465 U.S. 463 (1984), and plaintiffs in New Mexico and elsewhere specifically relied on this misreading in an attempt to resurrect boundaries of Indian reservations long

deemed disestablished. The Utah Supreme Court has now disagreed with the Tenth Circuit Court's decision in *Ute Indian Tribe* and ruled that a restoration to the public domain Act diminished the same reservation in Utah. *Utah v. Perank*, —— P.2d ——, 191 Utah Adv. Rep. 5 (Utah 1992), *Utah v. Hagen*, —— P.2d ——, 191 Utah Adv. Rep. 26 (Utah 1992), set forth in Resp. App. at 4a-75a. This Court should resolve the conflicting decisions between the state and federal courts on this issue.

Amici States have an obvious sovereign interest in knowing, with some degree of certainty, where the boundaries of Indian reservations are located. The present petition presents a valuable opportunity to continue the process, begun by the Court's modern decisions in *Seymour v. Superintendent*, 368 U.S. 351 (1962), of defining the manner in which surplus land statutes of this kind affected Indian reservations throughout the United States.[1]

SUMMARY OF ARGUMENT

The Utah Supreme Court decided the issue within the guidelines of this Court's precedents, but the *en banc* majority of the court of appeals did not. The *en banc* majority's rationale, premised on a misconstruction of the significance of "public domain" language, is of substantial concern to *Amici*. Heretofore, the equation of public domain language with reservation disestablishment has been a universally accepted principle of federal Indian law. Throughout the Western States, Congress and the Executive Branch routinely utilized such terminology in the language and legislative history of Acts such as presented here. While *Amici* unequivocally support and share the concern of Respondent State of Utah that the second largest Indian reservation in the

[1] The majority of other States ordinarily interested in federal Indian law issues were not notified or requested to join in this brief because of time restrictions.

United States (4,000,000 acres) has been resurrected in Utah as a result of this misconstruction, the sweeping mischaracterization of *Solem* by the *en banc* majority undermines an area of federal Indian law that is of even broader consequence.

ARGUMENT

1. The relationship of public domain terminology to Indian reservations is of paramount significance in federal Indian law. In South Dakota, for example, millions of acres of Indian reservations were "restored to the public domain". *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 589 (1977). *See, generally, Sioux Tribe of Indians v. United States*, 316 U.S. 317 (1942). The Utah Supreme Court was clearly correct when it noted:

> we have encountered only one case that stands contrary to these Supreme Court decisions on the effect of restoration language. *Ute Indian Tribe v. Utah*, 773 F.2d 1087 (10th Cir. 1985) (*en banc*), *cert. denied*, 479 U.S. 994 (1986) . . .

Perank, Resp. App. at 23a.

The Utah Supreme Court also identified the source of the problem. In essence, the *en banc* majority in *Ute Indian Tribe* mistakenly believed that this Court's 1984 decision in *Solem v. Bartlett*, *supra*, changed the law in reservation boundary cases. *Perank*, Resp. App. at 24a-28a.

Until the *en banc* majority's decision, no court seriously questioned that operative language was not precisely suited to disestablishment. *Seymour v. Superintendent*, 368 U.S. 351, 354-55 (1962); *Mattz v. Arnett*, 412 U.S. 481, 504 n.22 (1973). See, generally, *United States v. Pelican*, 232 U.S. 442 (1914).

Indeed, in 1975, when this Court framed the issue in *DeCoteau v. District County Court*, 420 U.S. 425 (1975),

it did so in terms of an underlying inquiry for "public domain" indicia:

> These two cases, consolidated for decision, raise the single question whether the Lake Traverse Indian Reservation in South Dakota, created by an 1867 treaty between the United States and the Sisseton and Wahpeton bands of Sioux Indians, was terminated *and returned to the public domain, by the Act of March 3, 1891.*

DeCoteau, supra at 426-427 (emphasis added).

Since the legislative history in *DeCoteau* indicated that Congress intended to restore the reservation to the public domain, the issue was decisively resolved. *See DeCoteau*, 420 U.S. at 441, where, after noting that the intended effect of the Act was made clear by the sponsors, this Court set forth in the text of the opinion two "public domain" excerpts from the Congressional Record ("surrender of a large portion of their reservation to the public domain"; "all this land is opened by this bill to settlement as a part of the public domain"), *Id.* at 439-441. In concluding, the Court reiterated this basic understanding:

> That the lands ceded in the other agreements were *returned to the public domain*, stripped of reservation status, can hardly be questioned, and every party here acknowledges as much. The sponsors of the legislation stated repeatedly that the ratified agreements would *return the ceded lands to the 'public domain.'* See *supra*, at 440-441. Cf. *Mattz v. Arnett*, 412 U.S. 481, at 504 n.22.

DeCoteau, 420 U.S. at 446. (emphasis added.)

Two years later, in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), this aspect of the issue was treated essentially the same. *Rosebud*, 430 U.S. at 589, 600, 600 n.21. Even the *Rosebud* dissent expressly acknowledged that "restored to the public domain" was "clear language of express termination", as the Utah Supreme Court noted. Resp. App. 21a-22a. *Rosebud*, 430 U.S. at 618 (Marshall, J., dissenting).

Moreover, with respect to operative public domain language, the decision of the *en banc* majority unequivocally "conflicts in principle" with not just one circuit but all circuits—in fact, it appears to "conflict in principle" with all reported decisions that have addressed indirectly or directly, the effect of a Congressional act or Executive order whose operative language restored an Indian reservation to the public domain. Brief of Respondent State of Utah 16-24. This controlling aspect of the opinion, which influenced the *en banc* majority's view of other pertinent factors, clearly warrants review.

Compounding the *en banc* majority's mischaracterization of *Solem* and making even more certain the predictability of additional litigation in these areas is the evaluation in a Comment in the *American Indian Law Review* that was awarded first place in the Indian Law Writing Competition at Harvard University:[2] The author there concludes, as did the *en banc* majority, after *Solem* "[t]he category of statutory language terminating a reservation has been reduced by *eliminating* 'public domain' . . . the argument *approved* in *Solem v. Bartlett*, that the public domain language in surplus land acts carried little meaning. . . .", *id.* at 69-70, 73 (emphasis added). In context, the remarks in *Solem* were not intended to support such a conclusion.[3] Nevertheless, that such a conclu-

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[2] Comment, *Reservations: The Surplus Lands Acts and the Question of Reservation Disestablishment*, 12 A.I.L.Rev. 57 (1986).

[3] In contrast to the operative public domain language in the Utah Acts and Proclamations, the reference to public domain in *Solem* was an isolated one. Public domain terminology did not appear in the operative language of the *Solem* Act, and although the reference itself was deemed supportive of disestablishment, *Solem* noted that it was "hardly dispositive" when "balanced against" other persuasive evidence of continuing reservation status. *Solem*, 465 U.S. at 475.

sion could be erroneously attributed to *Solem* shows how unsettling and disruptive the *en banc* majority's decision promises to be.

2. Significantly, the Utah Supreme Court also noted:

> After the decision in *Ute Indian Tribe* was rendered, a panel of the Tenth Circuit in *Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1397-1404 (10th Cir.), *cert. denied*, 111 S. Ct. 581 (1990), revisited the issue of the legal meaning of the phrase "restore to the public domain" and held that when used as operative statutory language, the phrase extinguishes reservation boundaries as to that land restored to the public domain. We set out an extended portion of the court's analysis of the legal effect of restoration language, an analysis *not* undertaken in *Ute Indian Tribe*.

Resp. App. 24a (emphasis added).

And, as Respondent State of Utah explains, this is an important and favorable development. Brief for Respondent State of Utah at 21-22. In addition, two other aspects of *Yazzie* merit brief attention.

First, even after *Yazzie*, the Tenth Circuit is still squarely divided on the public domain question. A petition for rehearing was denied on an even vote. *Pittsburg & Midway Coal Mining Co. v. Yazzie*, No. 88-2413, Order Denying Rehearing *en banc* (10th Cir. July 23, 1990). In this light, the need for additional guidance from this Court is apparent.

Secondly, there is no question that others would benefit from this guidance as well, as *Yazzie* also attests.

> In this context, we note that in the companion case of *Blatchford v. Sullivan*, 904 F.2d 542 (10th Cir. 1990), another judge in the federal district of New Mexico ruled that the New Mexico 709/774 area had lost reservation status. In other words, two separate judges from the same federal district, using much of the same evidence, made directly contrary findings of fact and conclusions of law with respect to the same issue of reservation status (see Appendices B and C hereto). Those conflicting findings and rulings are simultaneously before us in our joint consideration of these cases.

Pittsburg & Midway Coal Mining Co. v. Yazzie, 909 F.2d 1387, 1394, n.7 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 581 (1990) (emphasis added).

Moreover, the confusion noted above is not limited to the public domain dispute in the Tenth Circuit. Most recently, in the Eighth Circuit the United States District Court in North Dakota appropriately recounted "the continuation of, to the Court, the some what inexplicable double standard" in a quick review of cases there involving other "virtually identical" Acts and yet, "opposite" results. Memorandum and Order at 2-3, *U.S. v. Standish*, Criminal Case No. C4-92-22-02 (D.N.D. October 29, 1992). *See e.g., United States v. Grey Bear*, 828 F.2d 1286 (8th Cir. 1987).

3. During the late 1800's and early 1900's Congress [4] and the President [5] frequently used public domain lan-

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[4] *See, e.g.*, 17 Stat. 633 (Round Valley); 23 Stat. 80 (Columbia); 25 Stat. 157, § 1 (Uintah); 25 Stat. 896, 21 (Great Sioux Nation); 27 Stat. 63 (Colville); 27 Stat. 467 (White Mountain Apache); 27 Stat. 642, (10 (Cherokee Outlet); 28 Stat. 678, 4 (Southern Utes); 35 Stat. 457, 25 (Navajo).

[5] *See, e.g.*, Exec. Order of July 2, 1872 (I Kappler 916) (Colville); Exec. Order of August 5, 1873 (I Kappler 813) (White Mountain Apache); Exec. Order of August 19, 1874 (I Kappler 856) (Blackfeet); Exec. Order of December 21, 1875 (I Kappler 874) (Hot Springs); Exec. Order of January 28, 1876 (I Kappler 889) (Malheur Res.); Exec. Order of October 30, 1876 (I Kappler 814 (White Mountain); Exec. Order of May 3, 1877 (I Kappler 821) (Mission Res.); Exec. Order of August 3, 1878 (I Kappler 831) (Tulee River); Exec. Order of August 9, 1879 (I Kappler 899) (Sioux); Exec. Orders of July 13, 1880 (I Kappler 856, 883 & 896) (Blackfeet, Fort Berthold and Yanktonais); Exec. Order of August 4, 1882

guage to open Indian reservations for entry and settlement. Until the decision of the *en banc* majority, such restoration-to-the-public-domain language meant that the reservation was disestablished, a point well understood by the Utah Supreme Court, by this Court, by Congress, by the President, by the Department of the Interior and by the Department of Justice.

Authoritative review by this Court at this time will limit the writs for *habeas corpus* and other related actions, in precisely the same manner as in *DeCoteau*, when this Court acted decisively and reversed the decision of the Court of Appeals for the Eighth Circuit for a similarly fundamental misconstruction. *DeCoteau*, 420 U.S. at 430, 447. In the absence of such review, an inordinate expenditure of time, effort and resources will continue to be wasted on an issue that had been settled for decades.

(I Kappler 834-35) (Ute); Exec. Order of September 13, 1882 (I Kappler 889-90) (Malheur Res.); Exec. Order of February 5, 1883 (I Kappler 823) (Mission Res.); Exec. Order of February 23, 1883 (I Kappler 904-05) (Chief Moses); Exec. Order of May 21, 1883 (I Kappler 890) (Malheur Res.); Exec. Order of March 20, 1884 (I Kappler 884-85) (Great Sioux Nation); Exec. Order of March 29, 1884 (I Kappler 885) (Turtle Mountain); Exec. Order of May 15, 1884 (I Kappler 875) (Jicarilla Apache); Exec. Order of June 3, 1884 (I Kappler 885) (Turtle Mountain); Exec. Order of January 29, 1887 (I Kappler 824) (Mission Indians); Exec. Order of March 2, 1889 (I Kappler 890) (Malheur); Exec. Order of December 22, 1902 (III Kappler 671) (San Carlos); Exec. Order of January 25, 1904 (III Kappler 681) (Sioux); Exec. Order of May 15, 1905 (III Kappler 675) (Capitan Grande Band); Exec. Order of June 17, 1909 (III Kappler 668 (Papago Indians); Exec. Order of November 11, 1909 (III Kappler 691) (Chehalis Indians); and Exec. Order of March 1, 1910 (III Kappler 685) (Mescalero).

CONCLUSION

For the foregoing reasons and the reasons stated in the Petition and the Brief of Respondent State of Utah, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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